No. 90-898

In The

Supreme Court of the United States

October Term, 1990

WILLIAM H. KUCHAREK; SHANGRI-LA ENTERPRISES, INC., doing business as DENMARK BOOKSTORE; PARADISE ONE, INC., doing business as PARADISE VIDEO STORE; AND GEM BOOKS, INC. doing business as PURE PLEASURE II BOOKSTORE,

Petitioners,

vs.

DONALD J. HANAWAY, Attorney General of the State of Wisconsin,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

STEPHEN M. GLYNN
JAMES A. WALRATH
SHELLOW, SHELLOW & GLYNN, S.C.
Attorneys for Petitioners
222 East Mason Street
Milwaukee, Wisconsin 53202
(414) 271-8535

QUESTIONS PRESENTED FOR REVIEW

1. Does Wisconsin's obscenity statute establish an unworkable and unconstitutionally vague guideline for distinguishing legal materials from prohibited materials, because it permits commerce in materials portraying explicit scenes of sexual conduct, so long as that conduct is simulated, but bans commerce in depictions and descriptions of actual sexual conduct?

2. Does the obscenity statute deny booksellers and videocassette dealers who distribute sexually explicit material equal protection of the law because it expressly exempts low-cost "contract printers" who publish obscenity as well as schools and libraries that commercially disseminate obscenity from criminal liability?

PARTIES TO THE PROCEEDINGS BELOW

Petitioners and respondent were parties to the proceedings in the United States District Court for the Eastern District of Wisconsin and the United States Court of Appeals for the Seventh Circuit. The caption of proceedings in the Court of Appeals, however, omitted a reference to petitioner Gem Books, Inc.

TABLE OF CONTENTS

Page

Questions Presented for Review i

Parties to the Proceedings Below ii

Table of Contents iii

Table of Citations iv

Opinion Below 1

Statement of Jurisdiction 2

Statute and Constitutional Provisions Involved 2

Statement of the Case 3

Reasons for Granting the Writ 5

I. The dividing line between sexually explicit materials depicting or describing actual sexual conduct and those that depict or describe explicit, yet simulated sex acts, is too unworkable and vague a standard for imposing criminal liability under Wisconsin's obscenity statute. 5

II. The statute denies booksellers and videocassette dealers who distribute sexually explicit materials equal protection of the law because it exempts low-cost contract printers who publish obscenity and schools and libraries that commercially disseminate obscenity. 13

Contents

Page

Conclusion 18

TABLE OF CITATIONS

Cases Cited:

City of Duluth v. Sarette, 283 N.W. 2d 533 (Minn. 1979) 14

City of Urbana ex rel. Newlin v. Downing, 43 Ohio St. 3d 109, 539 N.E. 2d 140 (1989) 10

Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) 15

Grayned v. City of Rockford, 408 U.S. 104 (1972) 12

Jenkins v. Georgia, 418 U.S. 153 (1974) 10

Kois v. Wisconsin, 408 U.S. 229 (1972) 9

Kolender v. Lawson, 461 U.S. 352 (1983) 9

Miller v. California, 413 U.S. 15 (1973) 5, 6, 7, 10, 18

Pollitt v. Connick, 596 F. Supp. 261 (E.D. La. 1984) 14

Regan v. Taxation with Representation, 461 U.S. 540 (1983) 16

Skyywalker Records, Inc. v. Navarro, 739 F. Supp. 578 (S.D. Fla. 1990) 7, 8

Contents

Page

Speiser v. Randall, 357 U.S. 513 (1958) 11

State v. Luck, 353 So. 2d 225 (1977) 14

State v. Princess Cinema of Milwaukee, Inc., 96 Wis. 2d 646, 292 N.W. 2d 807 (1980) 16, 17

Tattered Cover, Inc. v. Tooley, 696 P.2d 780 (Colo. 1985) 17

United States v. Kantor, 677 F. Supp. 1421 (C.D. Cal. 1987), vacated and remanded sub. nom., United States v. U.S. Dist. Court for Cent. Dist. of Cal., 858 F.2d 534 (9th Cir. 1988).....10, 11

U.T., Inc. v. Brown, 457 F. Supp. 163 (W.D.N.C. 1978) 14, 17

Ward v. Illinois, 431 U.S. 767 (1977) 9

Wheeler v. State, 281 Md. 593, 380 A.2d 1052 (1977), cert. denied, 435 U.S. 997 (1978) 17

Statutes Cited:

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1331 3

28 U.S.C. § 1343(3) 3

28 U.S.C. § 2201 3

Contents

Page

28 U.S.C. § 2202 3

42 U.S.C. § 1983 3

Wis. Stat. § 944.21 (1987-88) 2, 3, 15

Wis. Stat. § 944.21(2)(c) 5

Wis. Stat. § 944.21(2)(d) 5

Wis. Stat. § 944.21(2)(e) 5

Wis. Stat. § 944.21(2)(f) 14

Wis. Stat. § 944.21(3)(a) 13

Wis. Stat. § 944.21(5m) 13

Wis. Stat. § 944.21(8) 13

Wis. Stat. § 944.21(8)(a) 13

Wis. Stat. § 944.21(10) 16

Wis. Stat. § 990.001(11) 17

Fla. Stat. Ann. § 847.001, et. seq. 7

United States Constitution Cited:

First Amendment 2, 3

Fifth Amendment 2

Contents

Page

Fourteenth Amendment 2, 3, 15

Other Authorities Cited:

Attorney General's Commission on Pornography, U.S. Department of Justice, Final Report (1986).....9, 10

Dietz & Sears, Pornography and Obscenity Sold in "Adult Bookstores": A Survey of 5132 Books, Magazines and Films in Four American Cities, 21 Mich. J.L. Ref. 7 (1988)..... 11

APPENDIX

Appendix A — Opinion of the Court of Appeals for the Seventh Circuit Dated May 7, 1990..... 1a

Appendix B — Order of the Court of Appeals for the Seventh Circuit Denying Petition for Rehearing With Suggestion of Rehearing En Banc Dated July 12, 1990..... 14a

Appendix C — Section 944.21, Wisconsin Statutes (1987-88) 16a

No.

In The

Supreme Court of the United States

October Term, 1990

WILLIAM H. KUCHAREK; SHANGRI-LA ENTERPRISES, INC., doing business as DENMARK BOOKSTORE; PARADISE ONE, INC., doing business as PARADISE VIDEO STORE; and GEM BOOKS, INC. doing business as PURE PLEASURE II BOOKSTORE,

Petitioners,

vs.

DONALD J. HANAWAY, Attorney General of the State of Wisconsin,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINION BELOW

The opinion of the United States Court of Appeals rendered

on May 7, 1990 is reported at 902 F.2d 513 (7th Cir. 1990). The opinion is contained in the appendix to this petition.

STATEMENT OF JURISDICTION

The Court of Appeals entered its opinion and judgment on May 7, 1990. An order denying a petition for rehearing and suggestion for rehearing en banc was entered on July 12, 1990. Review in this Court is sought pursuant to 28 U.S.C. § 1254(1).

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment I provides in part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

United States Constitution, Amendment V provides in part:

> No person shall . . . be deprived of life, liberty or property, without due process of law . . . .

United States Constitution, Amendment XIV provides in part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wisconsin Statute § 944.21 (1987-88) is set forth verbatim in the Appendix.

STATEMENT OF THE CASE

Wisconsin's present obscenity statute, Wis. Stat. § 944.21 (1987-88) became effective June 17, 1988. Petitioners, two adult bookstores, an adult bookstore clerk, and a general videocassette rental store, filed an action on June 21, 1988 in the United States District Court for the Eastern District of Wisconsin, and sought a declaration that the new statute was unconstitutional along with an injunction against its enforcement. Jurisdiction of the district court was based on 28 U.S.C. §§ 1331 and 1343(3) with petitioners' causes of action founded on 42 U.S.C. § 1983, 28 U.S.C. §§ 2201 and 2202, and the First and Fourteenth Amendments to the United States Constitution.

Petitioners charged that the law was unconstitutionally vague because it was unclear whether it encompassed materials containing simulated depictions of sex acts and also whether it applied to videotape materials. Assuming that simulated materials were not covered, petitioners argued that the statute still would be unconstitutional because of the unintelligible and vague distinction between materials depicting actual sex acts and those containing simulations of such acts. Also, because the statute exempted certain publishers for commercially printing obscenity, and exempted schools and libraries for commercially distributing such material, while booksellers, magazine dealers, and videocassette dealers still were subject to prosecution for dealing in the same materials, petitioners challenged the statute as violative of the Equal Protection Clause.

On June 12, 1989, the district court concluded that the distinction in the statute between actual depictions and simulated depictions of sexual conduct permeated the entire statute and rendered it unconstitutionally vague. The court enjoined enforcement of the statute.

The district court rejected petitioners' other vagueness challenge in which they asserted that the statute failed to specify whether videotape materials were covered at all. The court did agree with petitioners' argument that the statute denied equal protection of the laws by arbitrarily exempting contract printers, schools and libraries from its prohibitions. The court held, however, that those exemptions were severable and that the entire statute therefore should not be invalidated.

Attorney General Hanaway appealed on September 1, 1989. In the United States Court of Appeals for the Seventh Circuit respondent Hanaway argued that the statute was not vague in its prohibitions because videotape materials were intended to be covered and simulated sex materials were not. He also argued that it was reasonable for the legislature to enact the exemptions under challenge both to protect schools and libraries from groundless censorship efforts and to allow contract printers to provide low-cost printing services without having to editorially review their printed product. The court reversed the district court's decision, concluding that the statute was not vague in the constitutional sense, 902 F.2d at 519, and that the statutory exemptions for contract printers, schools and libraries were not irrational or unconstitutional, *id.* at 520-21.

REASONS FOR GRANTING THE WRIT

I.

THE DIVIDING LINE BETWEEN SEXUALLY EXPLICIT MATERIALS DEPICTING OR DESCRIBING ACTUAL SEXUAL CONDUCT AND THOSE THAT DEPICT OR DESCRIBE EXPLICIT, YET SIMULATED SEX ACTS, IS TOO UNWORKABLE AND VAGUE A STANDARD FOR IMPOSING CRIMINAL LIABILITY UNDER WISCONSIN'S OBSCENITY STATUTE.

Wisconsin's obscenity statute applies to any commercial performance or commercial dealing in material which "describes or shows" sexual conduct in a patently offensive way. Wis. Stat. §§ 944.21(2)(c) and (d). The "sexual conduct" described or shown in a prohibited fashion is defined as the "commission" of sexual acts ranging from intercourse to lewd exhibition of the genitals. § 944.21(2)(e).

The statute represents a noticeable departure from the obscenity test crafted and approved by the United States Supreme Court in *Miller v. California,* 413 U.S. 15, 24-25 (1973). The Court's obscenity definition referred to material that "depicts or describes, in a patently offensive way, sexual conduct" meaning "ultimate sexual acts, normal or perverted, actual or simulated." *Id.* By contrast, the Wisconsin legislation refers to materials or performances that describe or show the "commission" of sexual acts, an indication that the legislature decided to prohibit one category of obscenity mentioned in *Miller, i.e.,* depictions or descriptions of *actual* sexual conduct, but not the other category of obscenity constituting simulated conduct.

By wandering from the *Miller* formulation, the Wisconsin legislature created the very confusion that this Court's decision

sought to avoid.

> We acknowledge . . . the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited. [Citation omitted.]
>
> * * *
>
> Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive "hard core" sexual conduct specifically defined by the regulating state law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution.

Miller v. California, 413 U.S. 15, 24, 27 (1973).

Respondent Hanaway, as Attorney General of the State of Wisconsin, argued in the Court of Appeals that the statute does not apply to simulations — "even the most realistic simulations." 902 F.2d at 518. The Court of Appeals then thought it was paradoxical that petitioners were complaining about the operation of an obscenity statute even more lenient than the one reviewed in *Miller v. California. Id.* at 515. But petitioners have no quarrel with the Wisconsin legislature's apparent decision to rein in the coverage of the statute. It is the formula the legislature chose to accomplish its purpose that presents the constitutional issue.

A few examples, drawing on past obscenity cases from Wisconsin and other jurisdictions, will demonstrate the problem.

As a beginning point, this Court should consider how unworkable the Wisconsin statute would be if it were applied to sexually explicit verbal performances or recordings. In *Skyywalker Records, Inc. v. Navarro,* 739 F. Supp. 578 (S.D. Fla. 1990), the district court was asked to decide whether the plaintiffs' "rap music" recording, *As Nasty As They Wanna Be (Nasty)*, performed by a group known as "2 Live Crew," was obscene under Florida's obscenity statute.[1] Unimpressed by the fact that public sales of the recording reached 1.7 million copies, the Broward County Sheriff sought to prohibit its distribution, claiming it was obscene. The district court agreed:

> [I]ts lyrics and the titles of its songs are replete with references to female and male genitalia, human sexual excretion, oral-anal contact, fellatio, group sex, specific sexual positions, sado-masochism, the turgid state of the male sexual organ, masturbation, cunnilingus, sexual intercourse, and the sounds of moaning.
>
> * * *
>
> The evident goal of this particular recording is to reproduce the sexual act through musical lyrics.
>
> * * *
>
> The recording depicts sexual conduct in graphic detail. The specificity of the descriptions makes the audio message analogous to a camera with a

---

1. Unlike the Wisconsin statute, the Florida obscenity statute (F.S.A. § 847.001, *et seq.*) "tracks the language of the controlling case of *Miller v. California*" in defining obscenity, 739 F. Supp. at 585, and specifically includes materials depicting both actual and simulated sex acts, *id.* at 591.

> zoom lens, focusing on the sights and sounds of various ultimate sexual acts.

Id. at 591-92.

The court had no difficulty in deciding that the lyrics fell within the Florida statute because it prohibited depictions of *both* actual and simulated sex acts. But what if the case had arisen in Wisconsin? How would a retail music store know whether its distribution would be permitted or prohibited when the obscenity ban, according to the Attorney General himself, applies only to depictions of actual sex? More importantly, how would a judge or jury decide the issue and what instructions could a trial judge offer a jury to resolve the issue?

Perhaps all verbal descriptions of sexual conduct are simulations, so that the statute would *never* apply in such circumstances. On the other hand, such descriptions necessarily "describe" *actual* sexual conduct[2]; so then the statute would *always* apply in such circumstances. But such an interpretation would make the legislature's distinction meaningless.

The district court in *Skyywalker* found that the recording described actual sex acts; but presumably the lyrics referred to fictional or pretend situations. In Wisconsin, such verbal depictions or descriptions of *fictional* accounts of *actual* sex acts might not be subject to the statute's prohibitions. But then the trier of fact would have to decide whether the singer or lyricist was referring

---

2. The district court in *Skyywalker Records* noted:

> The depictions of ultimate sexual acts are so vivid that they are hard to distinguish from seeing the same conduct described in the words of a book, or in pictures in periodicals or films.

Id. at 591.

to real or fictional accounts, hardly the type of fact that should determine criminal liability. Or perhaps the law would apply if the state presented evidence that the lyrics were *intended* to refer to actual sexual episodes, even though the recording itself did not specifically suggest as much. But a retailer or broadcaster, for example, could hardly be expected to have knowledge of such an intent. Yet criminal liability under the statute conceivably could hang on just such an absurdity.

The same confusions reappear when one moves from verbal descriptions to consider written descriptions of sexual conduct. Written materials could be an easy target under the Wisconsin law, even though it is not at all clear that such writings are subject to its provisions.[3] For example, in *Kois v. Wisconsin,* 408 U.S. 229, 231 (1972), this Court reviewed an "undisguisedly frank, play-by-play account of [an] author's recollection of sexual intercourse," describing actual sexual conduct which could be prohibited by the statute. This Court held that the writing was not obscene. But what if it had been obscene? Would it be legal or illegal under Wisconsin's new statute? Describing a "recollection" of actual sex surely is tantamount to writing a simulated account of sexual conduct. No judge or jury could tell the difference and neither could a bookseller or a magazine vendor.

The dividing line under the statute is not discernible because the Wisconsin legislature has created a permitted category of obscenity that cannot be distinguished from its illegal form. Hence, the statute simply fails to provide those minimal guidelines to govern law enforcement which due process requires. *Kolender v. Lawson,* 461 U.S. 352, 358 (1983).

---

3. Magazines and books containing explicit references to sexual conduct are considered common fare at adult bookstores. 2 Attorney General's Commission on Pornography, U.S. Department of Justice, Final Report 1452-56 (1986). *See also, Ward v. Illinois,* 431 U.S. 767, 771 n. 3 (1977).

If one considers pictorial depictions of sex, even more confusion results. Pictures of "ultimate sexual acts" which focus on the bodies of actors presumably could fall within the Wisconsin statute. *See Jenkins v. Georgia,* 418 U.S. 153, 161 (1974). Yet some courts have concluded that such pictures portray only "simulated" sex, as the term was used in *Miller v. California,* as long as the actual contact involving sexual organs is not discernible or is obscured. *See, e.g., City of Urbana ex rel. Newlin v. Downing,* 43 Ohio St. 3d 109, 539 N.E. 2d 140 (1989). The Wisconsin law simply offers no guidance to decide this issue.[4]

The Court of Appeals thought the legislature's apparent distinction between portrayals of simulated and actual sex was paradoxical.

> [W]ith the resources of modern photographic and cinematographic technology, simulations of virtually any form of human behavior can be produced that are impossible for the viewer to distinguish from the real thing. A movie industry that can produce a shockingly realistic simulation of decapitation can produce a simulation of sexual intercourse so realistic that the viewer will believe that he is watching a movie of actual intercourse. From the viewer's standpoint, the depiction and the simulation are identical; if one is obscene, so is the other.

Kucharek, 902 F.2d at 518. The same observation was made in *United States v. Kantor,* 677 F. Supp. 1421, 1431 (C.D. Cal. 1987),

---

4. Yet these kinds of edited pictures are very common. Films and videotapes with these types of depictions are often introduced into the subscription television market. 2 Attorney General's Commission on Pornography, U.S. Department of Justice, Final Report 1374 (1986).

vacated and remanded sub nom., United States v. U.S. Dist. Court for Cent. Dist. of Cal., 858 F.2d 534 (9th Cir. 1988): "The physical acts which actors are required to perform to achieve a simulation of intercourse may be entirely innocuous, even where the simulated visual effect may be more or less lascivious."[5]

What, then, is to prevent a police officer, a prosecutor, a judge or jury from arbitrarily and mistakenly condemning realistically simulated material under the Wisconsin statute? If, as the Court of Appeals suggested, "the consumer of pornography may not be able to distinguish an actual depiction of sexual intercourse from a highly realistic one," 902 F.2d at 519, why is there reason to think that police officers and prosecutors would be any better at drawing such distinctions?

The problem, therefore, is that by removing depictions of simulated sex from the prohibitions of the Wisconsin statute, the statute is rendered vague because of the difficulty both in defining and detecting what are simulated versus actual depictions of sex.[6] This difficulty leads necessarily to arbitrary, standardless, uninformed, and baseless official decisions to confiscate materials and to prosecute book, magazine, film and video dealers. For if the consumer cannot distinguish legal materials which portray simulated sex from illegal materials, portraying actual sex, neither can a law enforcement officer, a prosecutor, a judge or a jury.

---

5. Such materials are commonly found at adult bookstores and other outlets. Dietz & Sears, *Pornography and Obscenity Sold in "Adult Bookstores": A Survey of 5132 Books, Magazines and Films in Four American Cities*, 21 Mich. J.L. Ref. 7, 15 (1988).

6. In a somewhat related context this Court stated: "The separation of legitimate from illegitimate speech calls for . . . sensitive tools . . . ." *Speiser v. Randall*, 357 U.S. 513, 525 (1958).

The requirement that a criminal statute contain sufficiently ascertainable standards for enforcement and for the determination of guilt is not confined to statutes having a direct impact on First Amendment interests. The ascertainable standards requirement instead is related to due process concerns:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972) (footnotes omitted).

The Wisconsin obscenity statute offends these very same values because of its unworkable distinction between simulated and actual portrayals of sexual conduct.

II.

THE STATUTE DENIES BOOKSELLERS AND VIDEOCASSETTE DEALERS WHO DISTRIBUTE SEXUALLY EXPLICIT MATERIALS EQUAL PROTECTION OF THE LAW BECAUSE IT EXEMPTS LOW-COST CONTRACT PRINTERS WHO PUBLISH OBSCENITY AND SCHOOLS AND LIBRARIES THAT COMMERCIALLY DISSEMINATE OBSCENITY.

The new law does not penalize the non-commercial transfer or exhibition of obscenity at all. But all commercial transactions are penalized, except commercial transactions conducted by a director or employee of a school or library. This exemption is found in Wis. Stat. § 944.21(8). In § 944.21(5m) contract printers, their employees, and agents are also exempted for producing and disseminating obscene material, even though § 944.21(3)(a) clearly prohibits the commercial printing of obscene material.

Many states, including Pennsylvania, Delaware and Maryland, have statutes exempting schools and libraries from prosecution for *non-commercial* involvement with obscene materials. Wisconsin, however, in § 944.21(8) exempts schools and libraries for their *commercial* activities with such materials. The exemption, to say the least, is curious since adult bookstores and videocassette rental outlets serve the same commercial function as schools and libraries when they commercially disseminate obscene material. Moreover, video stores offer a wide range of cassettes, not just sexually explicit videos. Such stores are the lending libraries of contemporary American society. Their materials are "current" and "balanced." Further, they too "reflect the cultural diversity and pluralistic nature of American society." These are the very characteristics of schools and libraries, according to the Wisconsin legislature, that resulted in their receiving exempt status. *See* § 944.21(8)(a), Wis. Stats.

The exemption for contract printers, on the other hand, applies so long as the contract printer has no editorial control over the obscene material. Petitioner Kucharek challenged the new statute because he too lacked editorial control over his store's inventory and he had less responsibility for the production and distribution of his store's materials than his suppliers did, some of whom conceivably qualify as contract printers under the statute. If editorial control over the material is the critical factor, then those distributors, exhibitors, and retailers who also lack editorial control over their stock in trade should also be exempt. Moreover, these persons certainly have less responsibility for the creation and production of the material than contract printers, yet they would be subject to prosecution, even for felonious conduct, under § 944.21(2)(f).

Several courts have declared that exemptions for schools and libraries in obscenity statutes unconstitutionally discriminate against those who are otherwise subject to the statute's sanctions. In *Pollitt v. Connick,* 596 F. Supp. 261, 265 (E.D. La. 1984), the court declared the Louisiana obscenity statute invalid insofar as it exempted schools, churches, museums, libraries and similar institutions. The court relied on the reasoning of the Supreme Court of Louisiana which declared the same law unconstitutional in *State v. Luck,* 353 So. 2d 225, 232 (1977):

> Louisiana has no legitimate interest in allowing a college, etc., to sell pornography for commercial gain, while prosecuting a commercial establishment next door for the same activity.

See also, U.T., Inc. v. Brown, 457 F. Supp. 163 (W.D.N.C. 1978); *City of Duluth v. Sarette,* 283 N.W. 2d 533 (Minn. 1979).

Likewise, there can be no legitimate interest in allowing contract printers to produce and publish obscenity for commercial

gain, while prosecuting commercial establishments just down the road that sell the very materials that were produced due to the exemption in the statute. Because contract printers by their very nature have significant contact with their product, and because their conduct is integral to the subsequent commercial distribution process, the statutory exemption in § 944.21 violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

The commercial dissemination of obscenity does not become less commercial and the materials do not become less obscene simply because the transactions occur on college campuses or in libraries. Likewise, those who publish obscenity without reviewing its content are no different from those who sell or exhibit it without prior review.

The exemptions therefore fail to meet this Court's rational classification test under the Equal Protection Clause. *Cleburne v. Cleburne Living Center,* 473 U.S. 432 (1985). The activities of government-funded libraries and schools in the main are non-commercial. So § 944.21, which applies only to commercial dealings, could not be used to harass those institutions, even if their activities might happen to involve obscenity. The legislature's concern that such institutions be protected from over-zealous censorship efforts, therefore, is unfounded. No similar legislative concern for contract printers even appears in the statute. They are granted favored status without any explanation at all. These aspects of the legislation concretely demonstrate "an irrational prejudice" against those businesses that periodically deal in obscene materials, legal and illegal, as represented by the petitioners in this action. *Cleburne,* 473 U.S. at 450. They function no differently than lending libraries operating in a commercial fashion that are protected by the statute. Further, persons such as petitioner Kucharek have no greater involvement in the distribution of obscenity, both in its legal and illegal forms, than do the exempt

class of contract printers. In short, the exempt classifications established by § 944.21 are not rationally related to any legitimate governmental purpose. *Regan v. Taxation with Representation,* 461 U.S. 540, 547 (1983).

If these exemptions are invalid, the whole statute should be voided, even in light of its severability clause, § 944.21(10). The Wisconsin Supreme Court has expressly disfavored reliance on such devices to save obscenity legislation. In *State v. Princess Cinema of Milwaukee, Inc.,* 96 Wis. 2d 646, 292 N.W. 2d 807 (1980) the court noted that obscenity statutes in particular present questions of public policy which are exclusively reserved to the legislature.

> The job of drafting penal legislation is primarily one for the legislature. This court is once again being asked to judicially amend the obscenity statute to bring it into compliance with the presently perceived standards emanating from the United States Supreme Court . . . . We conclude, at this time, that this is a determination for the legislature.

96 Wis. 2d at 658, 292 N.W. 2d at 813-14.

In *Princess Cinema,* the court concluded that it was uncertain as to the degree to which the legislature and the people of the state wanted any particular kind of obscenity statute. Having made that judgment, the court concluded that once a constitutional flaw in the statute was discovered, the decision as to how it should be remedied resided solely with the legislature.

> We are recognizing that our job is one of interpreting statutes, not redrafting them . . . . This [obscenity] statute has been subjected to this

> Court's perception that the legislature and the people want an obscenity statute with those standards imposed. We feel that it is no longer our function to make this judgment.

96 Wis. 2d at 662, 292 N.W. 2d at 815.[7]

---

7. Rather than invalidate the obscenity statute in its entirety, the court in *Princess Cinema* could have pointed to Wisconsin's general severability clause, Wis. Stat. § 990.001(11), to conclude that the statute should be given continued effect with its constitutional flaws removed. But the court instead favored invalidation of the entire statute. After invalidating exemptions in obscenity statutes and related legislation, several courts have voided completely the statutes at issue. *E.g., U.T., Inc. v. Brown,* 457 F. Supp. 163, 170 (W.D.N.C. 1978); *Wheeler v. State,* 281 Md. 593, 380 A.2d 1052 (1977), *cert. denied,* 435 U.S. 997 (1978); and *Tattered Cover, Inc. v. Tooley,* 696 P.2d 780 (Colo. 1985).

CONCLUSION

The Wisconsin obscenity statute represents a flawed effort to address delicate constitutional issues. The legislature tinkered with the *Miller* test for obscenity, perhaps believing that it needed improvement. It attempted to protect special interest groups by exempting contract printers and schools and libraries. The result of these disparate efforts was the creation of a hodgepodge of arbitrary distinctions, irrational exemptions and vague definitions.

For these foregoing reasons, petitioners respectfully request this Court to grant their petition for writ of certiorari.

Dated: October 10, 1990.

Respectfully submitted,

STEPHEN M. GLYNN
JAMES A. WALRATH
SHELLOW, SHELLOW &
GLYNN, S.C.
Attorneys for Petitioners

APPENDIX A — OPINION OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED MAY 7, 1990

In the

United States Court of Appeals

For the Seventh Circuit

No. 89-2885

WILLIAM H. KUCHAREK; SHANGRI-LA ENTERPRISES, INC., doing business as DENMARK BOOKSTORE; and PARADISE ONE, INC., doing business as PARADISE VIDEO STORE,

Plaintiffs-Appellees,

v.

DONALD HANAWAY, Attorney General of Wisconsin,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 88 C 657—J.P. Stadtmueller, *Judge.*

ARGUED FEBRUARY 21, 1990—DECIDED MAY 7, 1990

Before POSNER and EASTERBROOK, *Circuit Judges*, and MOODY, *District Judge.**

POSNER, *Circuit Judge.* The Attorney General of Wisconsin appeals from an order declaring—at the behest of several purveyors of sexually explicit books, magazines, and videotapes—Wisconsin's obscenity statute unconstitutional, and enjoining its enforcement. The statute, Wis.

* Hon. James T. Moody, of the Northern District of Indiana, sitting by designation.

Stat. § 944.21, was enacted in 1988, after eight years in which Wisconsin had no obscenity statute, the predecessor to section 944.21 having been held to violate the First Amendment in *State v. Princess Cinema, Inc.*, 96 Wis. 2d 646, 292 N.W.2d 807 (1980). Passage of a successor statute was stubbornly resisted by booksellers and publishers but eventually the differences between proponents and opponents were compromised by the enactment of a statute considerably less severe than authorized by *Miller v. California*, 413 U.S. 15 (1973). As the plaintiffs concede, Wisconsin could cure the infirmities that the district judge found in the statute by replacing it with one that went to the limits permitted by *Miller*, and such a statute would fence the plaintiffs in more tightly than the present one does. But the plaintiffs hope that if the Wisconsin legislature were faced with a choice between a stricter statute and no statute, it would choose no statute, in which event the plaintiffs would be under no state-law constraints at all and would therefore be even better off than they are under the present statute. This explains the paradox of pornographers' arguing that an anti-pornography statute is unconstitutional because too lenient, but it does not explain why the argument persuaded the district judge.

The statute defines obscene material as "a writing, picture, sound recording or film" which appeals to the prurient interest, describes or shows sexual conduct in a patently offensive way, and lacks any redeeming social value. Anyone who sells such material "with knowledge of [its] character and content" is guilty of a crime, but there are exemptions for contract printers and also for officers and employees of public, and accredited private, schools and public libraries. The district judge concluded, in a thoughtful opinion, that the statute is unconstitutionally vague, and therefore denies due process, insofar as it fails to indicate clearly whether simulations of sexual conduct as distinct from depictions or descriptions of actual sexual conduct are comprehended within the definition of "obscene," but not insofar as it fails to specify whether videotapes are included within the definition of

"material." The judge thought it plain that videotapes are included—the statute would be senseless otherwise—although the plaintiffs renew in our court their argument that the statute is hopelessly vague in this respect also. The judge further held that the statute denies the plaintiffs equal protection of the laws by arbitrarily exempting schools, libraries, and contract printers. He invalidated the statute in its entirety because he did not think that its vagueness could be cured by interpretation, but he added that the statute's severability clause would have allowed him to lop off the exemptions without invalidating the rest of the statute if they alone had been unconstitutional.

Although there have been as yet no prosecutions—of the plaintiffs or of anyone else—for violation of Wisconsin's new obscenity statute, it is early days, and the plaintiffs have made an adequate showing that they want to sell materials which the statute actually or arguably prohibits and that they are deterred from doing so by a reasonable fear of prosecution. So there is a real controversy between them and the state, and the suit can be maintained in a federal court without violating Article III of the Constitution. *Bowers v. Hardwick*, 478 U.S. 186, 188 (1986); *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 327 (7th Cir. 1985), aff'd without opinion, 475 U.S. 1001 (1986); *Alleghany Corp. v. Haase*, 896 F.2d 1046, 1049 (7th Cir. 1990). The existence of an actual controversy is much clearer than in *Bowers*. Obscenity laws are enforced, though erratically and ineffectively; sodomy laws are not enforced. The plaintiff in *Bowers* had been arrested for committing sodomy, but he had not been prosecuted; nor had anyone else during the preceding forty years. Yet the plaintiff was held to have standing to sue to enjoin the enforcement of the state's sodomy statute.

The plaintiffs have not attempted to show that the libraries, schools, or contract printers exempted by the statute are actual or potential competitors of theirs in the sale of pornographic materials and hence that the plaintiffs are being forced to compete with entities upon which the statute has conferred a privileged status. The lack of

such a showing may appear to cast another shadow over the plaintiffs' standing to challenge the exemptions, but the appearance is deceptive. A person is allowed to point to the existence of an exemption in order to demonstrate the irrationality of a prohibition to which he is subject, even if the exemption itself does not harm him by conferring an advantage on a rival. That is a common way of making an equal protection challenge. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987); *Orr v. Orr*, 440 U.S. 268, 272-73 (1979). It does no violence to the concept of standing. It is true that the harm to the plaintiffs that is essential to their right under Article III to maintain this suit comes not from the exemptions but from the threat of prosecution of the plaintiffs, who are not exempt. But because there is a harm to them that emanates from the statute, they have standing to maintain this suit without running afoul of Article III's limitation of the jurisdiction of the federal courts to actual cases. *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982); *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1525-26 (7th Cir. 1990). The question whether the exemptions are so unreasonable as to deny the plaintiffs equal protection of the laws is a question about the merits of the constitutional challenge rather than about their right to mount such a challenge.

The state argues that the district judge should not have reached the merits—that he should have abstained under the doctrine of *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941), to enable the Wisconsin courts to give the statute an interpretation that might eliminate constitutional doubts. The district judge rejected the argument in part because he could imagine no saving interpretation and in part because—a related point—he felt capable of interpreting the statute himself. Certainly from an intellectual standpoint the judge was capable of interpreting the statute, but an important difference between interpretation of a state statute by a federal court and by a state court is that only the latter interpretation is authoritative.

If the district judge had read Wisconsin's new obscenity statute so narrowly as to obviate all constitutional questions, it would still be possible for the state to prosecute people for violating the statute as broadly construed, because the enforcement of the statute would not have been enjoined. And, conversely, in a case such as this in which the district judge, having interpreted the statute, enjoins it in its entirety, he deprives the state courts of an opportunity to save at least a part of the statute by a narrowing interpretation. As a matter of comity, states ought to have that opportunity—even at the price of some delay in the winding up of litigation as the parties adjourn the federal suit to seek the guidance of the state court—unless the statute simply is not susceptible of a narrowing interpretation.

Judge Stadtmueller thought this such a case; we need not decide whether he was right. For if a challenged statute is unproblematic from a federal constitutional standpoint no matter how it is (within reason) interpreted, then there is no point in the federal district court's wasting the time of the parties and of the state court system by abstaining. *American Booksellers Ass'n, Inc. v. Hudnut*, *supra*, 771 F.2d at 327; *Mazanec v. North Judson-San Pierre School Corp.*, 763 F.2d 845, 848 (7th Cir. 1985). This is such a case, and we therefore agree, though for a reason different from that of the district judge, that abstention was not required.

The plaintiffs conceded at argument that Wisconsin's obscenity statute raises no problems under the First Amendment. That is not because the statute forbids less obscenity than the state could get away with forbidding without violating the First Amendment as construed in *Miller v. California*. It is easy to imagine a statute that would not exert the state's full power over obscenity yet would violate the First Amendment. A statute forbidding the sale of obscene books unless the book confined its depictions to procreative sex would be one. The state is permitted to suppress obscenity but it is not permitted to distort

the marketplace of erotic discourse by suppressing only that obscenity which conveys a disfavored message. It makes no difference whether this conclusion is premised on the equal protection clause as informed by policies drawn from the free-speech and free-press clauses, *Carey v. Brown*, 447 U.S. 455, 461-62 (1980), or on the speech and press clauses themselves. *Id.* at 471-72 (Stewart, J., concurring); *Arkansas Writers' Project, Inc. v. Ragland*, *supra*, 481 U.S. at 229-30; *Police Dept. v. Mosley*, 408 U.S. 92 (1972); *American Booksellers Ass'n, Inc. v. Hudnut*, *supra*.

However, a statute that exempts a particular material embodiment of obscene expression, such as videotapes, as the plaintiffs continue to insist this statute does, does not present a danger of distorting the market in ideas and expression unless particular messages are correlated with particular material embodiments, which the plaintiffs do not suggest they are. The exemptions in *Arkansas Writers' Project*, in contrast, included ones based on subject matter—for example, religious magazines were exempted from the challenged tax on publications. A statute that exempts (as Wisconsin's obscenity statute may) realistic simulations of sex, but draws the line at depictions of actual sex, does not distort the market in erotic art and entertainment either—at least no argument has been made that it does. Likewise with the exemption of contract printers, public libraries, and public and private schools and colleges: no one suggests that these entities have been exempted because they purvey a brand of obscenity (anti-Communist obscenity perhaps?) that the authorities are willing to condone because they like the point of view that informs it, or that the exemption will alter the cultural or political content of the pornography sold in Wisconsin. The reason the Wisconsin statute does not go as far as it might to prohibit obscenity is not that the statute makes value judgments among the different viewpoints reflected in obscene materials but that the forces opposed to censorship had the political muscle to force a compromise that arbitrarily, but not invidiously, limited the statute's reach.

Not every compromise obscenity statute is certain to pass muster under the First Amendment; a compromise might be motivated by concerns with the social merit of different obscene productions or, regardless of motivation, might fall unequally on different points of view. But this statute does not present these problems.

The plaintiffs argue not that the Wisconsin obscenity statute violates the First Amendment but that it is unconstitutionally vague and that the exemptions for schools, libraries, and contract printers are irrational. A criminal statute must, if it is to comport with the requirements of due process, give fair notice of its prohibitions to those persons potentially subject to it. The primary purpose of this doctrine as articulated in the modern cases is the realistic one of limiting prosecutorial discretion rather than the unrealistic one of protecting the reliance of people—for there are precious few—who actually read statutes, criminal or otherwise, before deciding whether to do something. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *Waldron v. McAtee*, 723 F.2d 1348, 1354 (7th Cir. 1983); *United States v. White*, 882 F.2d 250, 252 (7th Cir. 1989). The two unsettled questions of interpretation pressed by the plaintiffs do not show that the Wisconsin obscenity law fails to provide reasonable notice of its proscriptions. Take first the question (on which the district court's decision pivots) whether the statute forbids realistic simulations of, as well as the actual "showing" of, sexual conduct. The Attorney General of Wisconsin has made the surprising concession that the statute does not forbid even the most realistic simulations. It is surprising because, with the resources of modern photographic and cinematographic technology, simulations of virtually any form of human behavior can be produced that are impossible for the viewer to distinguish from the real thing. A movie industry that can produce a shockingly realistic simulation of decapitation can produce a simulation of sexual intercourse so realistic that the viewer will believe that he is watching a movie of actual intercourse.

From the viewer's standpoint, the depiction and the simulation are identical; if one is obscene, so is the other. The qualification, "from the viewer's standpoint," may be significant, though. In the case of actual depiction, the performers are engaged in actual sex acts, presumably for money. They could, therefore, conceivably be regarded as prostitutes, *People v. Freeman*, 46 Cal. 3d 419, 758 P.2d 1128 (1988); *State v. Kravitz*, 511 P.2d 844 (Ore. App. 1973), and there is a long-standing if erratically enforced state interest in the suppression of prostitution. But except in the case of children, the draftsmen of obscenity laws do not seem particularly concerned with protecting the morals of actors and actresses.

The distinction between simulated and actual sexual activity produces further paradoxes in the case of nonpictorial obscenity. It can hardly matter whether a verbal description of sexual intercourse is a description of actual intercourse between two real people or a description of intercourse between two fictional characters. The only difference will be the names of the persons, and that will be no difference at all from the reader's standpoint if the author does not reveal whether they are real or fictional persons.

The Attorney General's concession regarding the scope of Wisconsin's new obscenity statute is so implausible that we hesitate to rely on it to dispel the ambiguity in the words, especially as he makes no representation that his concession would bind either other law enforcement officials in Wisconsin or the courts of Wisconsin. It is true that the statute itself requires the Attorney General's approval before local prosecutors can proceed against violators. Wis. Stat. § 944.21(7). But the Attorney General has not committed himself to deny approval if any is sought for a prosecution of depictions of simulated sex acts; he may change his mind about the meaning of the statute; and he may be replaced in office. And although federal courts frequently defer to state executive interpretations of state statutes, *Board of Education v. McCluskey*,

458 U.S. 966 (1982) (per curiam); *Huggins v. Isenbarger*, 798 F.2d 203, 207-10 (7th Cir. 1986) (per curiam) (concurring opinion), the question here is not whether we should defer to the Attorney General's interpretation but whether the Wisconsin Supreme Court is likely to defer to it; if we are unable to say "yes," we acknowledge the existence of an unanswered interpretive question. *Id.* at 209.

There is still no failure of fair notice. A statute may contain a serious ambiguity; this will not in itself make the statute vague. New statutes, criminal as well as civil, frequently contain ambiguities. If that alone made them unconstitutionally vague, it would be difficult to enact new statutes. The objection to vague statutes is that they invite arbitrary and discriminatory enforcement by those who administer the statute. A statute that contains one or several ambiguities that can be dispelled, at a stroke, by interpretation is not open to that objection and therefore is not vague in the constitutional sense. Either the Wisconsin statute forbids realistic simulations of sex along with actual depictions (provided of course that the simulation as well as the actual depiction is patently offensive), or it does not; once that issue is resolved by the Wisconsin courts, the ambiguity will be dispelled, the discretion of the law enforcement authorities of Wisconsin canalized.

The Attorney General's interpretation does however produce a vagueness in *application* that an interpretation of the statute as forbidding simulated as well as actual depictions of sex would not produce. Just as the consumer of pornography may not be able to distinguish an actual depiction of sexual intercourse from a highly realistic one, so a bookseller or a bookseller's clerk may be unable to make the distinction. How then is he to avoid an inadvertent violation of the statute? There are two answers, each sufficient. The first is that statutes that impose strict criminal liability are not considered unconstitutionally vague; the dilemma of the bookseller would be no different from that of a man accused of statutory rape of a girl who appears to be of age. The second is that the bookseller or clerk can be convicted under the Wisconsin statute only

if he has knowledge of the character of the material that he is selling. Wis Stat. § 944.21(3). He can always ask his supplier to certify the character of the material, and if the certification is believable and believed, he will have a haven.

Analysis of the question whether the statute covers obscene videotapes—the other question that the plaintiffs contend makes the statute unconstitutionally vague—proceeds similarly. If the statute does not include videotapes, it has an enormous loophole difficult to make sense of. A videotape is a form of recording and also a form of film (loosely understood), so there is no semantic barrier to fitting videotapes under the statute, and we can think of no plausible reason why the legislature might want to exempt videotapes. It is true that videotapes are for home viewing, and the statute disclaims regulating private sexual conduct, Wis. Stat. § 944.01, but magazines are for home reading, and the statute covers them; the statute is not limited to the public consumption of obscenity. Political explanations for the exclusion of videotapes are possible, and were hinted at in the district court, but the evidence is weak. We agree with the district judge that, on this score, the statute is not vague or ambiguous; it forbids obscene videotapes. But if this were not clear, it would just be another example of a one-shot ambiguity that will be resolved one way or the other by the Wisconsin courts, and then there will be no room left for law enforcement officials to enforce the statute unequally by interpreting it now one way, now another.

We move on to the question whether the statute denies equal protection of the laws by arbitrarily excluding libraries and schools, on the one hand, and contract printers, on the other. We think not. Libraries and schools are not in the business of purveying or exhibiting pornographic materials. They are, however, frequent targets of private citizens concerned, sometimes in an ignorant and narrow-minded way, with the exposure of their children to immoral influences. Mindless censorship, flavored with hysteria, of textbooks and of reading lists, of school libraries and of

public libraries, is an old story, Boyer, Purity in Print (1968); Haight, Banned Books (4th ed. 1978), but one with plenty of contemporary vitality. The record in this case contains newspaper articles reporting the efforts of parents to bar *The Wizard of Oz* and the *Garfield* comic strip from school libraries. The purpose of the exemption is to shield libraries and schools from groundless complaints of disseminating obscene materials, and is rational. *Commonwealth v. Ferro*, 372 Mass. 379, 361 N.E.2d 1234 (1977); *4000 Asher, Inc. v. State*, 290 Ark. 8, 13-14, 716 S.W.2d 190, 193 (1986); *M.S. News Co. v. Casado*, 721 F.2d 1281, 1291-92 (10th Cir. 1983). In holding a similar exemption unconstitutional, the court in *State v. Luck*, 353 So. 2d 225, 232 (La. 1977), overlooked the purpose of the exemption and as a result thought it groundless. The exemption is not irrational once its purpose is grasped.

No doubt it rather depreciates Wisconsin's commitment to extirpating obscenity to create an exemption of this sort; for imagine the hue and cry if Wisconsin exempted officials and employees of schools and public libraries from criminal liability for prostitution or rape. But this is a state that got along for eight years with no obscenity statute at all: the American Denmark. There are degrees of perceived criminal gravity, and apparently in Wisconsin obscenity is of not much more than zero degree. But Wisconsin can makes its own judgment about the seriousness of obscenity as a social problem responsive to criminal punishment without encountering problems under the equal protection clause, and it ill becomes pornographers to complain about the leniency of an obscenity statute.

The exemption of educational and charitable institutions from legal liability is common. Charities were long exempt from tort liability, and they remain largely exempt from property taxes. These are not exemptions from criminal liability, but such exemptions are common too. The Sherman Act, a criminal statute, is riddled with them. E.g., 15 U.S.C. §§ 17, 640, 1012(b), 1801; 46 U.S.C. § 814; *Flood v. Kuhn*, 407 U.S. 258 (1972). The existence of an exemption will rarely if ever invalidate a statute unless the dis-

tinction created by it is invidious—say a head tax from which Christians are exempt.

Contract printers may not be as worthy an object of legislative solicitude as educational and eleemosynary institutions, but neither are export associations or agricultural cooperatives or R&D joint ventures or many other beneficiaries of exemptions from criminal statutes. We have just expressed our doubts whether irrational exemptions invalidate a statute unless they create invidious distinctions between the burdened and the exempted, but if these doubts are groundless it makes no difference because the exemption of contract printers is not irrational in any sense of the word. They are low-cost, low-markup operations, in part because their employees do not attempt sophisticated assessments of the prurience or social value of the materials they print. The Wisconsin legislature arrived at a plausible judgment that the burden of criminal liability for the production of obscene materials would fall particularly heavily on contract printers and that the costs of this burden exceeded the benefits in plugging what might otherwise seem a loophole in the statute. This is the kind of judgment (no different in principle from refusing to impose liability on gun manufacturers for the criminal use of their product) that in our system is committed to state and federal legislatures rather than to federal courts, with exceptions inapplicable to this case.

Although the exemption for contract printers appears to be unique to Wisconsin, parallel exemptions, for example for nonmanagerial employees, have generally, and as it seems to us correctly, been upheld. *People v. Illardo*, 48 N.Y.2d 408, 399 N.E.2d 59 (1979). The more puzzling, although commonplace, exemption of movie projectionists (to the exclusion of other employees of movie theaters) has also been upheld. *State v. Lesieure*, 121 R.I. 859, 873-74, 404 A.2d 457, 464 (1979); *State v. Baker*, 11 Kan. App. 2d 4, 711 P.2d 759 (1985). The correctness of these decisions can be debated, *Pack v. City of Cleveland*, 1 Ohio St. 3d 129, 438 N.E.2d 434 (1982); *Wheeler v. State*, 281

Md. 593, 380 A.2d 1052 (1977), but it is enough for our purposes that the particular exemptions challenged in *this* case are rational. We add that, if the plaintiffs are customers of contract printers, they may actually benefit from that exemption, since it makes those printers' costs (which include the expected costs of any criminal liability) lower than they otherwise would be.

From language in *Carey v. Brown* and other decisions in which equal protection analysis is infused with concerns drawn from the First Amendment (most recently, *Austin v. Michigan Chamber of Commerce*, 110 S. Ct. 1391, 1396 (1990)), an argument could be mounted that exemptions from obscenity statutes deserve a more searching review than they have received. But why? What is exempted is obscene, and what is not exempted is also obscene, and we cannot see why the drawing of statutory lines within a category of expression that is deemed not to be protected by the First Amendment should be inhibited by First Amendment worries, unless, to repeat an earlier qualification, the line is drawn on a forbidden basis such as the political content of the exempted materials. *Ripplinger v. Collins*, 868 F.2d 1043, 1050 (9th Cir. 1989).

The judgment is reversed with directions to dissolve the injunction and dismiss the suit with prejudice.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — ORDER OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC DATED JULY 12, 1990

In The

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

No. 89-2885

July 12, 1990

Before

Hon. Richard A. Posner, Circuit Judge

Hon. Frank H. Easterbrook, Circuit Judge

Hon. James T. Moody, District Judge*

WILLIAM H. KUCHAREK; SHANGRI-LA ENTERPRISES, INC., doing business as DENMARK BOOKSTORE; and PARADISE ONE, INC. doing business as PARADISE VIDEO STORE,

Plaintiffs-Appellees,

---

* Hon. James T. Moody, of the Northern District of Indiana, sitting by designation.

Appendix B

vs.

DONALD HANAWAY, Attorney General of Wisconsin,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 88 C 657.

J.P. Stadtmueller, Judge.

ORDER

On May 21, 1990, plaintiffs-appellees filed a petition for rehearing with suggestion for rehearing en banc. All of the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the suggestion for rehearing en banc. The petition is therefore DENIED.

APPENDIX C — SECTION 944.21, WISCONSIN STATUTES (1987-88)

Section 944.21, Wisconsin Statutes (1987-88)

(1) The legislature intends that the authority to prosecute violations of this section shall be used primarily to combat the obscenity industry and shall never be used for harassment or censorship purposes against materials or performances having serious artistic, literary, political, educational or scientific value. The legislature further intends that the enforcement of this section shall be consistent with the first amendment to the U.S. constitution, article I, section 3, of the Wisconsin constitution and the compelling state interest in protecting the free flow of ideas.

(2) In this section:

(a) "Community" means this state.

(b) "Internal revenue code" has the meaning specified in s. 71.01(6).

(c) "Obscene material" means a writing, picture, sound recording or film which:

1. The average person, applying contemporary community standards, would find appeals to the prurient interest if taken as a whole;

2. Under contemporary community standards, describes or shows sexual conduct in a patently offensive way; and

3. Lacks serious literary, artistic, political,

educational or scientific value, if taken as a whole.

(d) "Obscene performance" means a live exhibition before an audience which:

1. The average person, applying contemporary community standards, would find appeals to the prurient interest if taken as a whole;

2. Under contemporary community standards, describes or shows sexual conduct in a patently offensive way; and

3. Lacks serious literary, artistic, political, educational or scientific value, if taken as a whole.

(e) "Sexual conduct" means the commission of any of the following: sexual intercourse, sodomy, bestiality, necrophilia, human excretion, masturbation, sadism, masochism, fellatio, cunnilingus or lewd exhibition of human genitals.

(f) "Wholesale transfer or distribution of obscene material" means any transfer for a valuable consideration of obscene material for purposes of resale or commercial distribution; or any distribution of obscene material for commercial exhibition. "Wholesale transfer or distribution of obscene material" does not require transfer of title to the obscene material to the purchaser, distributee or exhibitor.

Appendix C

(3) (intro) Whoever does any of the following with knowledge of the character and content of the material or performance and for commercial purposes is subject to the penalties under sub. (5):

(a) Imports, prints, sells, has in his or her possession for sale, publishes, exhibits, or transfers any obscene material.

(b) Produces or performs in any obscene performance.

(c) Requires, as a condition to the purchase of periodicals, that a retailer accept obscene material.

(4) Whoever does any of the following with knowledge of the character and content of the material is subject to the penalties under sub. (5):

(a) Transfers or exhibits any obscene material to a person under the age of 18 years.

(b) Has in his or her possession with intent to transfer or exhibit to a person under the age of 18 years any obscene material.

(5) (a) Except as provided under pars. (b) to (e), any person violating sub. (3) or (4) is subject to a Class A forfeiture.

(b) If the person violating sub. (3) or (4) has one prior conviction under this section, the person is guilty of a Class A misdemeanor.

Appendix C

(c) If the person violating sub. (3) or (4) has 2 or more prior convictions under this section, the person is guilty of a Class D felony.

(d) Prior convictions under Pars. (b) and (c) apply only to offenses occurring on or after the effective date of this paragraph . . . . [revisor inserts date].

(e) Regardless of the number of prior convictions, if the violation under sub. (3) or (4) is for a wholesale transfer or distribution of obscene material, the person is guilty of a Class D felony.

(5m) A contract printer or employe or agent of a contract printer is not subject to prosecution for a violation of sub. (3) regarding the printing of material that is not subject to the contract printer's editorial review or control.

(6) Each day a violation under sub. (3) or (4) continues constitutes a separate violation under this section.

(7) A district attorney may submit a case for review under s. 165.25(3m). No civil or criminal proceeding under this section may be commenced against any person for a violation of sub. (3) or (4) unless the attorney general determines under s. 165.25(3m) that the proceeding may be commenced.

(8) (a) The legislature finds that the libraries and educational institutions under par. (b) carry out the essential purpose of making available to all citizens a current, balanced collection of books, reference materials, periodicals, sound recordings and audiovisual materials that reflect the cultural diversity and

pluralistic nature of American society. The legislature further finds that it is in the interest of the state to protect the financial resources of libraries and educational institutions from being expended in litigation and to permit these resources to be used to the greatest extent possible for fulfilling the essential purpose of libraries and educational institutions.

(b) No person who is an employe, a member of the board of directors or a trustee of any of the following is liable to prosecution for violation of this section for acts or omissions while in his or her capacity as an employe, a member of the board of directors or a trustee:

1. A public elementary or secondary school.

2. A private school, as defined in s. 115.001(3r).

3. Any school offering vocational, technical or adult education that:

   a. Is a vocational, technical and adult education district school, is a school approved by the educational approval board under s. 38.51 or is a school described in s. 38.51(9)(f), (g) or (h); and

   b. Is exempt from taxation under section 501(c)(3) of the internal revenue code.

4. Any institution of higher education that is

accredited, as described in s. 39.30(1) (d), and exempt from taxation under section 501(c)(3) of the internal revenue code.

5. A library that receives funding from any unit of government.

(9) In determining whether material is obscene under sub. (2)(c)1 and 3, a judge or jury shall examine individual pictures or passages in the context of the work in which they appear.

(10) The provisions of this section, including the provisions of sub. (8), are severable, as provided in s. 990.001(11).